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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. 273

In the Matter of I. WALTER MECKLEY,
Petitioner,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. .

In the Matter of I. WALTER MECKLEY,
Petitioner,

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, I. WALTER MECKLEY, respectfully represents:

I. SUMMARY STATEMENT OF MATTER INVOLVED.

On May 7, 1943, the Grand Jury for the District Court of the United States for the Middle District of Pennsylvania made a presentment against I. Walter Meckley, the petitioner herein.

Said presentment (R. 2a) charged that on or about the 7th day of December, 1942, the Grand Jurors at Harrisburg, Pennsylvania, at the December 1942 term of said

Court, undertook an inquiry into the activities of persons, companies, corporations, groups and associations whose names were then unknown to the Grand Jurors, relating to alleged frauds committed against the Government in connection with the construction of the Naval Supply Depot located at Mechanicsburg, Pennsylvania (R. 3a).

Said presentment also charged that on or about January 26, 1942, the petitioner, without having submitted written bids or proposals, was given a purchase order by Brann & Stuart, Inc., the general contractor in charge of construction, for 35,000 tons of slag and on subsequent dates said original purchase order was renewed and extended to include the purchase of additional tonnage of slag (R. 3a).

Said presentment also charged that on January 13, 1943 and subsequent thereto the petitioner, after being duly sworn before said Grand Jury, testified to having withdrawn by eight separate checks, each payable to himself, amounts totalling $38,125.48 from "his bank in hundred dollar bills and which he placed in his pocket, but that the said I. Walter Meckley will not disclose to the Grand Jury what he did with these specific withdrawals and said that he doesn't remember whether he went to the races with the money, whether he won or lost at each race, or whether he put it in his lock box" (R. 5a).

Said presentment also charged, without specification, that the petitioner has given obstructive, evasive, perjurious and contumacious answers to questions propounded to him before the Grand Jury, has deliberately, wilfully and contumaciously obstructed the investigation "in uttering answers which were half truths, which impeded, delayed and hampered the instant investigation, which sought to shut off and block the instant inquiry; in giving answers which were shifts and subterfuges instead of truths; in blocking the search for truth by answering with the first preposterous fancy which he chose to put forward;

in contumaciously parrying with the examiner and Grand Jurors; and in otherwise failing and refusing truthfully to answer" the questions put to him (R. 6a-7a). A copy of the testimony before the Grand Jury was filed with the presentment (R. 1a).

On the basis of said presentment the District Court of the United States for the Middle District of Pennsylvania on May 7, 1943, entered a rule to show cause why the petitioner should not be adjudged in contempt of Court and said rule was made returnable on May 8, 1943 (R. 75a).

On May 8, 1943, the petitioner filed an answer to said rule denying that he had given obstructive, evasive, perjurious or contumacious answers or that he deliberately, wilfully or contumaciously obstructed the investigation of the Grand Jury (R. 76a).

On May 8, 1943, a hearing was had and argument heard by the said District Court, the Honorable Albert L. Watson presiding. At said hearing the only testimony offered by the Government was in respect to the charge in the presentment relating to the petitioner's testimony concerning who dictated the proposal for the slag. No testimony was taken concerning either the other specific charge in the presentment or the general charge therein on which the Circuit Court relied to sustain the conviction. The District Court in its opinion adjudging the petitioner guilty of contempt, completely disregarded the oral testimony offered by the Government at the hearing and the charge of the presentment relative thereto (R. 79a).

On May 26, 1943, said District Court filed an opinion adjudging the petitioner guilty of contempt and made absolute the rule granted on May 7, 1943 (R. 86a).

On May 26, 1943, the District Court sentenced the petitioner to serve the term of three months imprisonment in the Dauphin County Jail at Harrisburg, Pennsylvania (R. 87a).

On May 27, 1943, the petitioner presented to said District Court his petition for allowance of an appeal and on the same day filed a notice of appeal, both under the civil and criminal rules (R. 89a).

On May 28, 1943, an order was made by the said District Court allowing the appeal (R. 90a).

After argument on appeal the Circuit Court of Appeals in an opinion filed July 22, 1943, affirmed the judgment of the District Court (R. 215a).

II. BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347).

III. QUESTIONS PRESENTED.

1. May a witness before a grand jury be adjudged guilty of contempt upon general charges vaguely and indefinitely stated?

2. Is the Court warranted in adjudging a witness before a grand jury guilty of contempt on the ground that the witness had testified falsely, evasively, obstructively and contumaciously when no extraneous evidence was produced to show that the witness had not testified truthfully and his whole story was not inherently improbable or necessarily unreasonable?

3. Is the Court warranted in adjudging a witness before a grand jury guilty of contempt when said witness under examination as to what he did with certain withdrawals of cash from his bank gives an accounting of the disposition he made of said withdrawals in the absence of

any extraneous evidence to show that said witness had not testified truthfully and his accounting is not inherently improbable or necessarily unreasonable?

4. Where a witness before a grand jury is charged generally with having wilfully, deliberately and contumaciously obstructed the process of the Court, is the Circuit Court of Appeals warranted in affirming a judgment of contempt by concluding that the defendant's guilt appears from the whole of his testimony without specifying in what manner the defendant had obstructed the investigation and no where in the record does it appear that the defendant had obstructed the investigation?

IV. REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The discretionary power of this Court to grant the writ requested is invoked because the Circuit Court of Appeals for the Third Circuit:

(1) Has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision; (See "Questions Presented", supra.)

(2) has decided an important question of Federal law which has not been but should be settled by this Court. (See "Questions Presented", supra.)

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein

named, a full and complete transcript of the record and all proceedings herein; and that the judgment of the Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

WILLIAM A. GRAY,
Counsel for Petitioner.

SAMUEL HANDLER,
EARL HANDLER,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the District Court has not yet been officially reported but a copy is to be found in the Record (R. 78a).

The opinion of the Circuit Court of Appeals for the Third Circuit, filed on July 22, 1943, has not yet been officially reported, but a copy appears in the Record (R. 215a).

II.

STATEMENT OF THE CASE.

Petitioner seeks to review the judgment of the Circuit Court of Appeals for the Third Circuit, filed July 22, 1943, affirming the judgment and sentence entered in the United States District Court for the Middle District of Pennsylvania on May 26, 1943 after a hearing before the Honorable Albert L. Watson, D. J.

The facts have been set forth in the foregoing petition (pp. 1-4) and will not be repeated.

III.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals for the Third Circuit erred:

1. In holding that the District Court did not err in adjudging petitioner guilty of contempt on charges not specifically set forth in the presentment.

2. In holding that the record discloses substantial evidence to sustain the findings of the District Court that the petitioner was guilty of contumacious conduct.

3. In concluding that the petitioner was guilty of contumacious conduct without specifying wherein he was so guilty and without showing wherein said conduct obstructed the investigation.

4. In affirming the judgment of the District Court.

IV.

ARGUMENT.

(1)

The Circuit Court Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, or So Far Sanctioned Such a Departure by a Lower Court, as to Call for an Exercise of This Court's Power of Supervision.

The presentment charged the petitioner with two specific acts of contumacy. As to one of these specific charges (i. e. perjury) the District Court found that the testimony offered by the Government at the contempt hearing did not prove said charge beyond a reasonable doubt (R. 79a).

The other specific charge related to the disposition of $38,125.48 which the petitioner withdrew from his bank by eight separate checks between May 16, 1942 and November 25, 1942 (R. 5a). The presentment charged that the petitioner "will not disclose to the grand jury what he did with these specific withdrawals, and further that he doesn't remember whether he went to the races with the money, whether he won or lost at each race or whether he put the money in his lock box" (R. 5a).

The examination of the petitioner before the grand jury was concerned principally with the disposition of this money. The evident purpose of such examination was to test the credibility of the petitioner's testimony that he had not paid any of the profits he received from selling slag to the Government's contractor to anyone connected with said contractor. The petitioner had testified that he had not paid any money to anyone connected with the contractor (R. 9a, 11a, 17a, 18a, 22a).

The petitioner fully and to the best of his recollection gave an accounting of the disposition he made of this money. And in doing so he supplied the Grand Jury with supporting data—such as the name of the person to whom he repaid a loan from this money, the name of the bank where he kept his personal account and his safe deposit box where he testified he had deposited some of the money and exhibiting United States War and Tax Bonds, which he testified he purchased with some of said money. He likewise testified to losing certain money on horse races, giving the names of the race tracks which he visited, the amounts which he lost and the names of the men who accompanied him.

The Government has never shown that this accounting was false in any respect or that it was inherently improbable or necessarily unreasonable. Cf. *Blim v. United States*, 68 F. (2d) 484. And neither the District Court nor the Circuit Court has pointed out wherein the petitioner's accounting was of this character. The District Court contented itself with the conclusion that the petitioner "had no clear recollection of what he did with this money" (R. 82a). Such conclusion completely ignored the accounting which the petitioner gave. The Circuit Court did not even comment upon the petitioner's testimony concerning his disposition of this money. It did not designate any specific act of contumacy but based its affirmance of the District Court's judgment upon the general charge of contumacy, with which the presentment concluded (R. 217a).

This general charge does not specify with any show of particularity wherein the petitioner contumaciously obstructed the process of the Court.

The judgment of contempt rendered against the petitioner upon this general charge was unquestionably a departure from the accepted and usual course of judicial proceedings.

A contempt proceeding of this nature is summary in character, and carries the criminal hallmark. Recognizing these facts, the courts have clothed a defendant in a contempt proceeding with the protective attributes generally associated with a defendant in a criminal proceeding. He is presumed to be innocent until that presumption is overcome and his guilt established beyond a reasonable doubt: *Blim v. United States,* supra; *United States v. Dachis,* 36 F. (2d) 601. And while there is no fixed formula for contempt proceedings and the nicety and precision of an indictment is not required, a person cited for contempt must be informed of the charges made against him so clearly and definitely as not only to show a prima facie case, but that when arraigned he might know what answers to make and how to prepare his defense: *Sona et al. v. Aluminum Castings Co.,* 214 F. 936. A person cannot be convicted for contempt upon general charges vaguely and indefinitely stated: *United States v. French,* 9 F. Supp. 30.

The Circuit Court was of the opinion that because the petitioner knew from the presentment that the charge of contumacy was based upon the whole of his testimony before the Grand Jury, the above rule was not applicable. If this were the law an oppressive burden would be cast upon a defendant, particularly where his testimony is voluminous. Especially is this true in a case where, as the record herein shows, the presentment was filed on May 7, 1943, returnable the following day and where the testimony consisted of 283 pages.

As stated by the District Court in an opinion affirmed

by the Circuit Court of Appeals for the Second Circuit in the case of *In re Cantor et al.*, 215 F. 61, at page 63:

> "There is one thing more: Every judicial proceeding and every charge to which another must respond justly requires that the respondent should know with reasonable definition what he has to answer. It will not do, as in this case, to throw at a man 120 pages of testimony and say generally that it is generally permeated with perjury. Some specification the most elementary rules of fair play demand, so that he may explain what he is charged with * * *".

Thus it will be observed that the authorities condemn the rendition of contempt judgments when based upon vague and general charges. This principle is grounded on the accepted and elementary rules of judicial procedure. The degree of particularity required may vary in relation to the nature of the judicial proceeding to which a person must respond. A contempt proceeding of a criminal nature takes on all the attributes of a criminal case. It is even more far-reaching and drastic because it is more arbitrary in character and therefore should always be exercised cautiously and with due regard to constitutional rights: *United States v. Moore*, 294 F. 852.

The specific issue with which the petitioner was confronted by the presentment in the instant proceeding related to his testimony concerning his disposition of certain designated moneys. The petitioner met this issue by accounting in his testimony for these moneys. The District Court ignored his accounting as likewise did the Circuit Court of Appeals. The latter Court in affirming the judgment against the petitioner did so on the basis of the general charge of contumacy laid in the presentment with reference to the specific charge therein. This general charge while accusing the petitioner with wilfully, deliberately and contumaciously obstructing the process of the

Court does not designate any particular answer or answers which bear this stigma. And the Circuit Court in its opinion has not done so.

In this connection, the Circuit Court said (R. 217a):

> "The appellant's principal contention is that the District Court erred in adjudging him guilty of contempt on charges not specifically set forth in the presentment. In other words, the appellant contends that, before the District Court could find, even as the predicate of a charge of contumacy, that, while a witness before the grand jury, he had given perjurious testimony, he must be informed of the charges made against him so clearly and definitely as not only to show a *prima facie* case but also to enable him to know, when arraigned, what answers to make and how to prepare his defense. *Assuming that this contention correctly reflects the law, it is not germane here.** The defendant knew from the presentment that the charge of contumacy was based upon the *whole of his testimony** before the grand jury which he had just given and a transcript whereof was appended to the presentment. He was sufficiently informed as to what he had to meet. Cf. Camarota v. United States, *loc. cit. supra.*"

We submit that petitioner *has* correctly stated the law and that it is *germane* here. A *prima facie* case is not made out when the general charge contains no reference to any specific answers and it is necessary for petitioner to analyze voluminous testimony to ascertain wherein his answers are supposed to be contemptuous.

We submit that this places an unreasonable burden upon any defendant in a contempt case who, though presumed to be innocent (*In re Eskay*, 122 F. (2d) 819) is

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*Italics supplied.

thus forced to guess at those answers which the grand jury considered contumacious.

It seems clear that the failure to indicate more specifically the answers which it was intended to charge as being contumacious deprives the petitioner of the notice to which he is entitled in order properly to prepare his defense.

The case of *Camarota v. United States*, 111 F. (2d) 243, cited and relied upon by the Circuit Court in this connection (R. 217a) supports petitioner's present position. There defendant refused to answer *certain* questions on the ground that they might incriminate him. He was called before the trial Judge and instructed to answer *those* questions, which he refused to do. He was adjudged guilty of contempt, and this judgment was affirmed by the Circuit Court which said (p. 246):

> "It is true that where, as here, the contempt was not committed in the actual presence and hearing of the district judge due process 'requires that the *accused should be advised of the charges and have a reasonable opportunity to meet them* by way of defense or explanation' . . . The record . . . discloses that appellant . . . had opportunity . . . to consult with counsel as to the propriety of his stand upon *each specific question* which he had refused to answer . . . that . . . he was told personally to appear before the district judge and answer the charge *arising out of his refusal to answer the questions propounded*. . . ." (Italics supplied).

Petitioner was not afforded this opportunity in the case at bar. He sufficiently answered the *specific* charge in the presentment. The record shows that he did in fact answer the questions propounded. As to the generalities, he was given no opportunity to answer—indeed, he had no way of knowing what had to be answered.

(2)

The Circuit Court Has Decided an Important Question of Federal Law Which Has not Been, but Should Be, Settled by This Court.

The conviction of the petitioner under these circumstances has serious implications, Obviously it is a departure from the accepted and usual course of judicial proceedings particularly when it is considered that this proceeding is of a criminal nature.

To the best of our knowledge this precise question has not been decided by this Court. However, this Court has recognized the necessity of definite issues in contempt proceedings and has disapproved of enforcing vague and general statements in contempt orders if not limited by specification of details: *Terminal Railroad Association of St. Louis et al. v. United States, et al.*, 266 U. S. 17, 29.

Moreover, this Court has held that an obstruction to the performance of judicial duty is the characteristic upon which the power to punish for contempt must rest and that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted: *Ex Parte Hudgings*, 249 U. S. 378, 383. This requirement would be circumvented if a defendant could be convicted of contempt upon general charges only without any specification of details.

CONCLUSION.

It is respectfully submitted that for the reasons stated, this Petition for a writ of Certiorari should be granted.

WILLIAM A. GRAY,
Counsel for Petitioner.

SAMUEL HANDLER,
EARL HANDLER,
Of Counsel.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 273

IN THE MATTER OF THE PRESENTMENT BY THE GRAND JURY OF WITNESS I. WALTER MECKLEY, PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 215–218) has not yet been reported. The opinion of the district court (R. 78–86) is reported at 50 F. Supp. 274.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 22, 1943 (R. 218). The petition for a writ of certiorari was filed August 19, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as

amended by the Act of February 13, 1925. And see *Nye* v. *United States,* 313 U. S. 33, 41–44.

QUESTIONS PRESENTED

1. Whether the judgment of contempt rendered against petitioner, based upon a presentment charging him with giving obstructive, evasive, perjurious, and contumacious answers to questions propounded to him before the grand jury, is invalid because the presentment, to which was attached a copy of the transcript of the whole of his testimony before the grand jury, did not recite which of his answers offended.

2. Whether the finding of the district court, affirmed by the circuit court of appeals, that petitioner was guilty of contempt before the grand jury, is supported by the transcript of petitioner's testimony before the grand jury.

STATUTE INVOLVED

Section 268 of the Judicial Code (28 U. S. C. 385) provides in part as follows:

> The courts of the United States shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, * * * and the dis-

> obedience or resistance by any * * * witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

STATEMENT

On May 7, 1943, after petitioner had testified before the same grand jury on January 13, April 28, and May 3, 5, 6, and 7, the grand jury filed a presentment charging him with contumacious conduct (R. 1, 2–7). The presentment recited that the grand jury had been investigating frauds committed against the Government in connection with the construction of the Naval Supply Depot located at Mechanicsburg, Pennsylvania, particularly in respect of the purchase of supplies under a contract entered into by the Government, through the Navy Department, with Brann & Stuart, Inc., a Pennsylvania corporation, on a cost-plus-a-fixed-fee basis; that, from testimony heard by the grand jury, it appeared that, without advertising for competitive bids, Brann & Stuart, Inc., had given petitioner purchase orders for slag and continued giving him such orders after it had received lower bids than the one subsequently submitted by petitioner; and that from these purchase orders petitioner made a net profit of $79,000, $68,125.48 of which he withdrew from his bank account at the Harrisburg National Bank,

Harrisburg, Pennsylvania, by checks payable to himself and to cash.[1]

The presentment then charged as follows (R. 5–7):

> * * * based on testimony heard by it [the grand jury] * * * on the 13th day of January 1943 and subsequent thereto, the said I. Walter Meckley, after being duly sworn, testified to having withdrawn the sums of money hereinbefore set out made payable to I. W. Meckley which said total amount of $38,125.48 he withdrew from his bank * * *, but * * * the said I. Walter Meckley will not disclose to the Grand Jury what he did with these specific withdrawals, * * *
>
> * * * * *
>
> * * * the said I. Walter Meckley, a witness before this Grand Jury has given

[1] These checks were as follows (R. 5):

Payable to I. W. Meckley

Date	*Amount*
May 16, 1942	$500.00
May 22, 1942	5,000.00
May 22, 1942	5,000.00
May 26, 1942	5,000.00
July 11, 1942	10,000.00
October 9, 1942	2,125.48
November 17, 1942	5,000.00
November 25, 1942	5,500.00
Total	$38,125.48

Payable in Cash

August 21, 1942	$10,000.00
August 22, 1942	10,000.00
September 2, 1942	10,000.00
Total	$30,000.00

obstructive, evasive, perjurious, and contumacious answers on questions propounded to him before this Grand Jury and has deliberately, willfully, and contumaciously obstructed the investigation of this Grand Jury in the matter hereinabove set forth. * * *

* * * the said I. Walter Meckley, willfully, deliberately, and contumaciously obstructed the process of this Court in uttering answers which were half truths, which impeded, delayed, and hampered the instant investigation, which sought to shut off and block the instant inquiry; in giving answers which were shifts and subterfuges instead of truths; in blocking the search for truth by answering with the first preposterous fancy which he chose to put forward; in contumaciously parrying with the examiner and Grand Jurors; and in otherwise failing and refusing truthfully and fully to answer these proper questions put to him in the proceedings before the Grand Jury.[2]

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[2] In addition to the contempt charges here quoted, the presentment charged that petitioner falsely testified that William De Sandre, the purchasing agent for Brann & Stuart, Inc., dictated petitioner's January 15, 1942, bid proposal for slag (see R. 5–6). There was testimony at the subsequent contempt hearing in support of this charge, but the district court, in holding petitioner guilty of contempt, "completely disregarded" this oral testimony and the charge of the presentment relative thereto because he did "not believe that this testimony shows beyond a reasonable doubt that this witness did give the perjurious answers as to which the oral testimony was offered" (R. 79).

A copy of the transcript of the whole of petitioner's testimony before the grand jury was appended to the presentment (R. 209), as the presentment alleged (R. 6).

The presentment was read to the district judge on the afternoon of May 7, 1943, in the presence of counsel for petitioner, who requested "an opportunity to review the testimony and also the presentment" (R. 207). He was furnished with a copy of the transcript of petitioner's testimony before the grand jury (R. 207–208, 209). His suggestion that the testimony of other witnesses should also be made available to petitioner was refused, the court stating that the judgment of contempt, if any, would rest solely upon the transcript of petitioner's testimony before the grand jury (R. 208). A rule to show cause was issued the same day, returnable the next morning and reciting that the presentment filed by the grand jury charged that petitioner "had given obstructive, evasive, and perjurious and contumacious answers to questions propounded to him before that Grand Jury and had deliberately, wilfully, and contumaciously obstructed the investigation of said Grand Jury in the process of this Court" (R. 1, 75, 207). On the following day petitioner filed an answer denying, verbatim, the charge outlined in the order to show cause (R. 2, 76–77). At the hearing on the order, petitioner did not dispute the authenticity of the transcript of petitioner's

testimony appended to the presentment and offered in evidence in support of the contempt charge (R. 209).

On May 26, 1943, the district judge filed an opinion (R. 78–86) in which, in addition to setting forth some of the evidence of petitioner's contumacy (R. 81–85), he stated he had examined with "great care" the transcript of petitioner's testimony before the grand jury (R. 80) and found that petitioner's conflicting, obviously false, and evasive answers concealed the true facts and were substantially equivalent to a refusal to testify; that there was "no room for doubt" that petitioner intended to and did obstruct the investigation of the grand jury; and that his contumacy was shown "beyond question" (R. 80–81, 85). The court thereupon adjudged petitioner guilty of contempt and sentenced him to imprisonment for 3 months (R. 86–87). The judgment was affirmed on appeal, the circuit court of appeals stating, *inter alia,* "From our reading of the record, which we have examined carefully and in detail, we think that the findings of the court below are abundantly sustained by the testimony and that the conclusion that the defendant was guilty of contumacious conduct is well justified" (R. 217–218).

The transcript of petitioner's testimony before the grand jury revealed that he was questioned principally regarding his disposition of the $68,-

125.48 which he withdrew from his account at the Harrisburg bank by checks payable to himself and to cash. He testified that in August 1941 he became acquainted with Mr. Hartline, superintendent of the Marietta project, which was being constructed at that time by Brann & Stuart, Inc., under a cost-plus-a-fixed-fee contract, and later with a Mr. Barrett, who was also employed on the Marietta project (R. 99–104, 193);[3] that it was at Barrett's suggestion that he purchased a truck and equipment to rent to the Marietta project (R. 103); that he went into the slag business in October 1941 through contract with Hartline (R. 105); that his net income for 1941, part of which was from the slag business at Marietta, was $19,674.53 (R. 203–204); that he began supplying slag for the Mechanicsburg project sometime after the first of 1942 and turned the business over to a Mr. Forney in August 1942 (R. 109, 200); that his net profit from the slag business during 1942, mostly from the Mechanicsburg project, was approximately $79,000 (R. 204); that he was constantly

[3] In accordance with the rule in the Third Circuit, the pertinent portions of the record in the case were printed in the appendices to the briefs filed in that court, rather than as a one-volume record. Our appendix (R. 98–209) contains the major portion of petitioner's testimony before the grand jury (R. 99–205), including practically all of that set out in petitioner's appendix (R. 8–74), and presents a more complete and accurate picture of the nature of the testimony. For this reason, our record references in this connection are to the portion of the printed record containing the appendix we filed in the court below.

in touch with Hartline regarding the supplying of the slag for the Mechanicsburg project and also was friendly with Hartline socially, having, among other things, bought a $1,200 boat at Hartline's suggestion although he had never seen the boat and could not operate one (R. 108, 116–117, 168–169, 170–171, 190–191); and that, although he generally paid his bills by check (R. 117), he withdrew approximately $68,500 in cash from his Mechanicsburg slag account at the Harrisburg Trust Co., Harrisburg, Pennsylvania, by eleven checks payable to himself and to cash, in the amounts and on the dates alleged in the presentment (*supra*, p. 4, fn. 1) (R. 121–122, 134, 167). Petitioner categorically denied ever giving anyone, including Hartline and Barrett, a "kickback" on the slag business (R. 107, 115, 116).

The evidence bearing directly upon petitioner's contumacy may be summarized as follows:[4]

When petitioner was first asked on January 13, 1943, what he did with the approximately $68,500 he obtained by cashing the eleven checks, he stated that he "carried it around"—about $10,000 in his pocket at one time—and then said he could show his disposition of the money if he could get his books (R. 108). When asked to explain the mat-

[4] Our summary of the evidence does not cover all of the instances of petitioner's contumacy, for, as the district court stated, "It would be impracticable to set forth here sufficient portions of the testimony to show the extent of the Defendant's utter disregard for the authority of the district court (R. 80).

ter without the benefit of his records, he professed to have loaned Forney $29,500 to get started in the slag business, which he had turned over to Forney because he "was tired of it," there was too much work attached to the business, and because Forney owed him $8,000. At the same time, he admitted that he had had nothing to do on the job except hire the trucks, that he did this work after Forney took over the business, and that although Forney made $10,000 in the business, the latter had never paid petitioner the $8,000 because petitioner had not asked him for it (R. 108–109, 111). Asked about the remainder of the money, petitioner stated that he bought $10,000 worth of tax bonds and, as to the balance, "If I get the books I can tell you"—"Get the books" (R. 109).

He was then questioned about losing money on horse races and stated he lost "a good bit of it" that way (R. 110). Presently, he admitted, "I didn't lose so great an amount of it" (R. 114) and, when asked how much, said he "spent last year approximately fifteen, twenty thousand dollars." When asked, "On horses?" he said "No." He then stated he could not tell how much he lost at the races (R. 114).

After he had changed the amount of tax bonds he had bought from $10,000 to $20,000, petitioner was asked to look at his records and explain the disposition of the remainder (assuming that he loaned Forney $29,500). He then stated, "During

that period I think I bought $3,000—about $8,000.00" worth of bonds—he could not tell from his books (R. 109, 112). He admitted that before the middle of 1941 he had little cash and no money in a checking account and that he was not so short of memory that he could not remember what he did with a $10,000 check four or five months previously, but furnished no explanation of his disposition of the money except that he loaned Forney $29,500 and bought $10,000 worth of bonds. The bond purchase was explained only by his assertion that he bought $3,000 worth in October 1942 and $700 worth in May 1942, a date which he later changed to January (R. 111, 118–120). He then asserted he would have to have his bookkeeper in order to explain his disposition of the money (R. 120).

Shortly thereafter he was specifically asked about his disposition of one of the $10,000 checks and stated that he put it in his safe deposit box at Elizabethtown. When asked, "Why would you draw it out of the checking account and put it in your safe deposit box?", he replied, "I do those things" (R. 120). He then again wanted his bookkeeper to refresh his memory and could not remember what he did with the cash obtained from the other checks (R. 121). He again asserted he loaned Forney $29,500 in cash and stated, "I have to have a memorandum to get the rest of it" (R. 122). He said, however, that he "may have" lost

part of it on horses (R. 123). After this, he testified that he bought $8,000 worth of bonds, to which he added $10,000 more and then admitted that these bonds were bought in January 1943 (R. 123). He then stated that he could not explain the disposition of the money with the aid of all his records but again wanted his bookkeeper because, as he explained, he had told the bookkeeper what he did with the money and his bookkeeper would refresh his recollection as to what he had told him (R. 124–125).

Then, when the examiner suggested to petitioner that he had cashed three of the $10,000 checks around the time he stated he had loaned Forney $29,500, petitioner testified that he deposited three of the $10,000 checks to Forney's bank account. However, he could not explain why he wrote three checks to deposit to Forney's account, admitting that he had had a pretty good idea how much Forney needed. (R. 126.) When questioned by a juror, he said he did not get a deposit slip for the $29,500 he deposited to Forney's account (R. 130). Petitioner subsequently stated that he had bought $3,000 worth of war bonds, Series E, during the period May to November 1942 (R. 130), which later turned out to be false (*infra,* pp. 14–15).

On April 28, 1943, petitioner testified before the grand jury with the aid of a memorandum which he stated he had had his bookkeeper prepare for him after he, petitioner, told the bookkeeper what

to put down (R. 143, 153, 156). On that date and on May 5th he was questioned concerning his disposition of each check. For the most part, he adhered to his story that he deposited to Forney's account the three $10,000 checks drawn to cash and dated August 21 and 22 and September 2 (see R. 144, 145–146, 147), but at one time or another gave a conflicting answer as to each check, stating that he bought $10,000 worth of tax bonds with the August 21st check (R. 143–144), that he "may have" deposited the August 22nd check to Forney's account (R. 145), and that he could not have transferred the September 2nd check to Forney's account "because his signature is on there" (R. 147). As to his disposition of three of the $5,000 checks dated May 22 and May 26, and of the $10,000 check dated July 11, he gave at different times two or more of the following explanations: He put the money in his pocket; put it in his safe deposit box; deposited it to his personal account; went to the races; did not remember what he did with it (see for first check dated May 22, R. 135–137, 138, 174, 175, 196; second check dated May 22, R. 138, 157, 175, 177, 196; $5,000 check dated May 26, R. 139, 196; $10,000 check dated July 11, R. 139–140, 182–183, 196). As to the other checks, he testified he used part of the $500 check dated May 16 for living expenses (R. 134–135, 174), gave the $5,500 check dated November 25 to a Mr. Balmer in repayment of a loan (R. 141, 197), and

bought bonds with the $2,125.48 check dated October 9 (R. 141).

On May 5th all of petitioner's testimony regarding his use of part of the $38,125.48 for the purchase of bonds was shown to be false insofar as the testimony was intended as an explanation of his immediate disposition of the proceeds of the checks. After having been asked on April 28 to bring in his bonds, petitioner appeared before the grand jury on May 3 with seven $100 war bonds, stating that after taking his bonds out of his safe deposit box the previous Thursday or Friday, he had mislaid all the rest, including three $1,000 war bonds (R. 162–164). The seven $100 war bonds were purchased previous to the period he drew any of the eleven checks totaling $68,125.48, the bonds being dated in January, February, and March of 1942 (R. 162), rather than in May 1942 as he had testified at one time (R. 120). On May 5th he brought the remainder of his bonds into court, explaining that after withdrawing them from his safe deposit box he had given them to a Mrs. Cohick at Wildwood, New Jersey, for safekeeping, and had forgotten about it (R. 178). Instead of having three $1,000 war bonds purchased during the period May to November 1942, as he had testified (R. 119, 163), he had two $1,000 war bonds and these he had ordered on May 3, the very day he testified he had mislaid three $1,000 war bonds (R. 179). The tax bonds in the amount

of $10,000, which he had referred to in one instance as amounting to $20,000 (*supra,* p. 10), were purchased in January 1943, more than five weeks after the date of the most recent check about which he was being questioned (*supra,* p. 4, fn. 1).

At times petitioner mentioned losing money on horse races, but his testimony in this connection was vague and conflicting. On January 13 he testified that he lost "a good bit" of the money on horses, then admitted "I didn't lose so great an amount of it," and finally stated that he could not tell how much he had lost at the races. He denied, however, that it was $15,000 or $20,000. (*Supra,* p. 10.) On May 5th he testified categorically that he had lost $12,000 or $15,000 at the races during the summer of 1942 (R. 188). When questioned about these losses, he remembered only that he lost "Several hundred dollars, it might be $250.00 or $300.00" at the Charlestown track and "About $3,000.00" at either Bowie or Laurel (R. 189). He stated that he had bet as much as $1,000 on one horse and had lost as much as $6,000 or $7,000 in one day, but assertedly did not remember the name of the horse on whom he had bet $1,000 (R. 176, 185–188). In contrast, he remembered that he had paid Balmer $25 a week when Balmer worked for him in 1926 and 1927 (R. 142); that Forney signed a check petitioner received from him (R. 148); that

Mrs. Hartline's nephew was five years old (R. 169); that Mrs. Hartline's brother was sixteen years old (R. 171); and that he paid $1.85 a ton for some stone he sold to the Mechanicsburg project (R. 201).

The examiner also sought an explanation of petitioner's disposition of the proceeds of the checks by comparison of his 1942 and 1943 gross income, disbursements, and present assets. Petitioner's explanation from this standpoint (see R. 149–160, 194–199), was about $25,000 short, without taking into account his 1941 income of $19,674.53, of which he testified he did not spend more than $5,000 on himself (R. 203–204). At one point when questioned in this connection, petitioner was asked if he had placed any money in his safe deposit box since his previous appearance before the grand jury. For a time he persistently refused to answer, then stated that he could not remember, and finally, after a brief recess, admitted that he put about $3,000 or $4,000 into the box since he last testified (R. 154–155).

The transcript of petitioner's testimony contains many other revealing instances of the character of his testimony. See R. 105; 112–113, 115–116; 117–118; 134–135; 146; 103, 165–166; 152–153; 153–154; 157. For instance, he answered one question with "That is true," and when asked "What is true?" replied "I don't know" (R. 146). Another time, when asked if he usually

knew where he spent large sums of money he carried around in his pocket, he replied, "Some I do, and some I don't want to know" (R. 105). In another instance, the record reveals that he smiled when replying "I don't remember anything" to a question relating to whether he paid Hartline or Barrett anything, and then, when asked why he had withdrawn this large amount of money from the bank in cash instead of making out checks to the persons to whom he intended to pay it, he replied, "I guess I like to feel the money" (R. 117–118).

ARGUMENT

I

Petitioner contends that the contempt judgment cannot stand because the presentment was too vague and general, in that it did not specify with particularity which of his answers before the grand jury were contumacious (Pet. 9–14). The contention is clearly lacking in merit.

In the first place, petitioner knew that the contempt charges were based upon the whole of his testimony before the grand jury (see *supra,* p. 6) and made no objection in that connection either at the reading of the presentment to the court on May 7 or at the contempt hearing on May 8. Cf. *O'Connell* v. *United States,* 40 F. (2d) 201, 203 (C. C. A. 2), certiorari dismissed, 296

U. S. 667. Secondly, petitioner concedes that he was "confronted" with the "*specific* issue * * * related to his testimony concerning his disposition of certain designated moneys" [italics supplied] (Pet. 11; see, also, Pet. 13). Since most of his testimony before the grand jury related to that subject (*supra,* pp. 9–16), the contempt judgment of the district court and the affirmance of the circuit court of appeals were necessarily predicated principally upon this "specific" charge (see R. 80–85, 217–218).

In any event, technical pleadings are not required in contempt cases; it is sufficient if petitioner was apprised of the *nature* of the charges against him. *Cooke* v. *United States,* 267 U. S. 517, 537; *Camarota* v. *United States,* 111 F. (2d) 243, 246 (C. C. A. 3), certiorari denied, 311 U. S. 651; *O'Connell* v. *United States, supra,* pp. 203–204; *Schwartz* v. *United States,* 217 Fed. 866, 868 (C. C. A. 4); *Hammond Lumber Co.* v. *Sailors' Union of the Pacific,* 149 Fed. 577, 580 (N. D. Cal.). That he was is clear from the presentment (*supra,* pp. 4–5), the proceedings before the district court (*supra,* pp. 6–7), and his concession that the contempt judgment is based upon what he regards as the general charges contained in the presentment.

Especially is it unnecessary to make a bill of particulars out of the presentment in a case, such

as the present, where the contumacy consists of the giving of evasive and obstructive answers. As the Circuit Court of Appeals for the Second Circuit stated in *O'Connell* v. *United States, supra,* pages 203–204, this type of contumacy "will seldom appear from a single answer or from a small portion of a witness' testimony. Only by considering a large number of questions and answers will obduracy of this character usually become apparent. * * * To have required the prosecutor to specify only part of" the testimony "would not have made the charge more specific; it would simply have limited the evidence * * * offered to sustain it." [5]

II

Petitioner appears to attack the sufficiency of the evidence to sustain the contempt judgment on the ground that he "fully and to the best of his recollection gave an accounting of the disposition he made of this" $38,125.48 which he withdrew from his bank by checks payable to himself, and that "The Government has never shown that this accounting was false in any respect or that it was

[5] None of the cases cited by petitioner can be construed as indicating a contrary view, except the opinion of the district court set out in the statement of the case in *In re Cantor*, 215 Fed. 61, 64 (C. C. A. 2) and quoted in petitioner's brief at page 11. The circuit court of appeals in that case, the same court which subsequently decided the *O'Connell* case, *supra*, affirmed the judgment of the district court without mention of the point here involved.

inherently improbable or necessarily unreasonable" (Pet. 8–9). But petitioner did not answer to the best of his recollection, and the remainder of these assertions ignores the ground upon which the judgment was based.

It should be noted at the outset that petitioner's conclusions from the evidence are distorted. His conflicting statements regarding his disposition of the $38,125.48 did not amount to an "accounting" of his disposition of the money, and a review of his testimony (*supra,* pp. 10–16) clearly impels the conclusion that he testified falsely in that connection.

It is immaterial, however, whether petitioner's testimony in all of its successive versions was in fact false, or whether in some of its successive versions it was true. He was charged with failing to disclose his disposition of the $38,125.48; giving answers which were obstructive, evasive, perjurious, contumacious, half truth, shifts, and subterfuges; "answering with the first preposterous fancy which he chose to put forward;" "contumaciously parrying with the examiner and Grand Jurors;" and "in otherwise failing and refusing truthfully and fully to answer" questions put to him in the proceedings before the grand jury (*supra,* pp. 3–5). The charges were properly based upon the whole of his testimony before the grand jury (*supra,* pp. 4–6). Plainly, petitioner did not answer to the best of his recollection, but

instead, as a statement of his testimony shows (*supra,* pp. 8–17), resorted to pretended failure of memory, procrastination, and concealment. The district court, in finding that petitioner's guilt was shown beyond a reasonable doubt (R. 80), stated, "I am not particularly concerned with the obvious falsity of the Defendant's testimony as such. What does concern the Court is that this Defendant by testifying falsely, and by utilizing other means of concealing the true facts, has obstructed and delayed the investigation. * * * from the standpoint of the value of the information obtained by the Grand Jury, the answers and statements made by him are substantially equivalent to a refusal to testify" (R. 80–81). As the circuit court of appeals stated, "What the court [district court] did was to conclude from a reading of the defendant's answers to the questions asked him before the grand jury that, on the whole, he had been evasive, reluctant and dissembling for the intended purpose of preventing and obstructing the grand jury from ascertaining anything from him concerning the matters under inquiry * * * and that such was indeed the quite evident effect of his conduct" (R. 217). The circuit court of appeals affirmed on this basis (R. 217–218). That it was a proper basis for the contempt judgment is clear, regardless of the falsity of petitioner's

answers, for it is contempt to obstruct the administration of justice by refusing to testify [6] or by giving answers which amount to a deliberate subterfuge [7] or concealment of facts,[8] or are vague, misleading, and evasive.[9]

In this light, the findings of the district court are, as the court below stated (R. 218), "abundantly sustained by the testimony [see *supra*, pp. 8–17] and * * * the conclusion that the defendant was guilty of contumacious conduct is well justified." Cf. *Clark* v. *United States*, 289 U. S. 1; *United States* v. *McGovern*, 60 F. (2d) 880 (C. C. A. 2), certiorari denied, 287 U. S. 650; *Schleier* v. *United States*, 72 F. (2d) 414 (C. C. A. 2), certiorari denied, 293 U. S. 607. Accordingly, this Court has no occasion to review the evidence further. *Delaney* v. *United States*, 263 U. S. 586, 589, 590; *United States* v. *Johnson*, Nos. 4 and 5, last term, decided June 7, 1943.

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[6] *Ex parte Hudgings*, 249 U. S. 378, 382.

[7] *United States* v. *McGovern*, 60 F. (2d) 880, 890 (C. C. A. 2), certiorari denied, 287 U. S. 650.

[8] *Clark* v. *United States*, 289 U. S. 1, 10; *O'Connell* v. *United States*, *supra*, pp. 204–205; *Lang* v. *United States*, 55 F. (2d) 922, 923 (C. C. A. 2), certiorari dismissed, 286 U. S. 523.

[9] *In re Presentment by Grand Jury of Ellison*, 133 F. (2d) 903 (C. C. A. 3), certiorari denied, 318 U. S. 791; *United States* v. *McGovern*, *supra*, p. 890; *Lang* v. *United States*, *supra*, p. 923; *Schleier* v. *United States*, 72 F. (2d) 414, 417 (C. C. A. 2), certiorari denied, 293 U. S. 607; *Loubriel* v. *United States*, 9 F. (2d) 807, 808 (C. C. A. 2); *In re Kaplan Bros.*, 213 Fed. 753 (C. C. A. 3), certiorari denied, 234 U. S. 765; *Ex parte Bick*, 155 Fed. 908 (S. D. N. Y.).

CONCLUSION

The case was correctly decided below and involves no conflict of decisions or important question of law. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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